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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PAUL HASTINGS LLP,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

L.A. PACIFIC CENTER, INC.,

Real Party in Interest.

No. B246925

(Los Angeles County
Super. Ct. No. BC435893)

ORIGINAL PROCEEDINGS in mandate. Mel Red Recana, Judge. Petition granted in part and denied in part.

Davis Polk & Wardwell, Christopher B. Hockett, Paul Spagnoletti; Paul Hastings and Eve M. Coddon for Petitioner.

No appearance for Respondent.

Greene, Broillet & Wheeler, Bruce A. Broillet, Mark T. Quigley, Scott H. Carr, Christian Nickerson; Esner Chang & Boyer, Stuart B. Esner and Andrew N. Chang for Real Party in Interest.

Petitioner law firm challenges the trial court's order denying summary judgment or summary adjudication of issues in this legal malpractice action, arguing that real party, its former client, cannot establish causation because it ultimately prevailed in the underlying action. We issued an alternative writ. We now conclude the court correctly denied summary judgment but hold that summary adjudication should have been granted as to the claim for punitive damages.

FACTUAL AND PROCEDURAL SUMMARY

In February 2004, L.A. Pacific retained Paul Hastings, Janofsky & Walker, LLP (now Paul Hastings LLP) to represent it with respect to the purchase of commercial property (the property) in Nevada. The property, consisting of the Alexis Park Hotel and the Americana Inns Apartments, was owned by Hotels Nevada LLC and Inns Nevada LLC. These entities were controlled by Louis Habash. (For convenience, we refer to the sellers collectively as Habash). Under the terms of the transaction, L.A. Pacific was to pay \$70 million at the time of closing, with an additional \$5 million to be paid upon the occurrence of certain events at the property, but no later than a specified outside payment date. The parties initially agreed this holdback period would be 12 months from closing.

During the finalization of the transaction, Richard Alter, a representative of L.A. Pacific, informed Paul Hastings by email that L.A. Pacific did not trust Louis Habash. According to Alter, Habash had applied for a casino license but withdrew the application; Alter asked that Paul Hastings find out if there was a problem. He noted that Habash owed his investors \$11 million in addition to outstanding loans. Alter asked Paul Hastings to investigate whether there were any current lawsuits or liens against Habash, or any recordings against the property. He noted that Habash expressed enthusiasm about the sale and promised to sign certain items, but that Habash's attorney had advised Habash "to sign nothing." He explicitly stated that "we do not trust Louis." Paul Hastings performed a litigation search and reported that "All are clear." Not included in its report was a pending action in Los Angeles Superior Court against Habash by Habash's partner in Inns Nevada for breach of written agreement, breach of fiduciary

duty, fraud and conversion. Among the allegations was that Habash, as manager of Inns Nevada, diverted over \$7 million from the company.

On March 23, 2004, Paul Hastings attorney Daniel J. Katz sent an email to J. Douglas Driggs, Jr., counsel for Habash, with the purchase and sale agreement (Agreement) attached for Habash's execution. Section 2.06(b) of the Agreement, found on page 12, contained the \$5 million holdback provision, and referenced a 12-month holdback period. It further provided: "The provisions of this 2.06(b) shall be a covenant running with the land comprising the Apartment real property . . . and shall be evidenced by a Memorandum of Agreement in the form of Exhibit A (the 'Memorandum')."

Exhibit A, the Memorandum, provided on page 2 for the payment of the \$5 million upon the occurrence of specified conditions or "twelve (12) months from the Closing Date." A third reference to the 12-month holdback period was contained in the actual Memorandum, which was essentially the same as Exhibit A.

That same day, documents were sent to Alter, who took them to L.A. Pacific for execution that evening. L.A. Pacific decided it would proceed only if the holdback period was increased to 60 months. With the understanding that the changes would be made, L.A. Pacific's president executed the documents. Habash was to sign the transaction documents the following day

Early in the morning of March 24, 2004, Alter informed Paul Hastings that L.A. Pacific insisted on changing the holdback period to 60 months. When Habash arrived at the Paul Hastings office to sign the documents, Alter informed him that L.A. Pacific would only allow the transaction to go forward if Habash agreed to change the outside payment date from 12 months to 60 months. Habash orally agreed to the change. Habash proceeded to sign four sets of the transaction documents prepared by Paul Hastings, including the documents referring to the holdback period: the Agreement, with Exhibit A attached, and the Memorandum. Paul Hastings' paralegal notarized the Memorandum signed by Habash and by L.A. Pacific's principal.

Under cover of a letter dated March 25, 2004, Paul Hastings hand delivered executed and notarized documents to Linda Peh, escrow officer for Atlantic Escrow.

Some of the documents still provided for a 12-month holdback period, while others provided for the 60-month holdback period. The Paul Hastings paralegal who had notarized the executed documents sent a set providing for the 12-month holdback period to Habash's counsel, Driggs.¹

According to Ms. Peh, the documents she received on March 25 included stapled copies of the Agreement containing the 12-month holdback provision, and a loose sheet inserted into those agreements containing the 60-month provision. Stapled copies of the Memorandum also contained the 12-month provision, with a loose sheet inserted with the 60-month provision. Ms. Peh received a telephone call from Paul Hastings attorney Dan Katz, who explained that the sheets were loosely inserted because time was short when the change to 60 months occurred, and they had to rush because the messenger was waiting to bring the documents to her. He told her that the 60-month period was the one the parties agreed to, and instructed her to remove the 12-month version and insert the 60-month version. Ms. Peh then participated in a conference call with Paul Hastings attorneys and Habash's attorney, Doug Driggs, at which it was discussed that the 60-month holdback period was correct, and the documents with that time period were the correct ones. Dan Katz instructed Ms. Peh to send him a complete set of documents, "which would be the definitive documents." He received that package a day or two later, and confirmed that the change with respect to the holdback period had been made.

No written confirmation was sought or received from Habash or his attorney about the exchanging of 60-month pages for 12-month pages in the executed documents. In the following weeks, Paul Hastings sent three separate checklists to Habash's counsel, each of which reflected the 60-month holdback period; no question was raised as to this item.

The transaction was scheduled to close on May 26, 2004. On the afternoon of May 24, 2004, Alter sent an email to Paul Hastings attorney Rick Kirkbride to verify that

¹ Paul Hastings claims L.A. Pacific should be estopped from relying on these documents (the Driggs documents). In section II of this opinion, we find judicial estoppel inapplicable.

the documents provided for a 60-month holdback period. Kirkbride replied that Alter must be working with a draft because Kirkbride's complete copy of the executed version, including the recordable memorandum, indicated a 12-month holdback. Then in the early evening, Kirkbride called the escrow office, spoke to Ms. Peh, and sent her an email with a 60-month document to "swap into" the Memorandum. The transaction closed and the corrected Memorandum was recorded. Paul Hastings did not inform L.A. Pacific about the error in the documents at the time the documents were executed or at the time of closing.

The property increased in value over the next several months. On April 20, 2005, Habash sent a letter "reminding" L.A. Pacific that under the Agreement, the 12-month holdback period for the final \$5 million would end on May 26, 2005. The letter provided information for wire transfer of the money. Alter met with Habash on April 21 and showed him the pertinent documents indicating the 60-month holdback period rather than the 12 months referenced in Habash's letter. Habash asked him to send complete copies of the purchase documents, which Alter did.

On May 4, 2005, before the end of the 12-month period Habash claimed was in effect, he brought an action in California against L.A. Pacific for rescission based on fraud; cancellation of written instruments based on illegality; and conspiracy. He alleged that he had refused L.A. Pacific's request that he extend the holdback period to 60 months, had executed the sale documents providing for the 12-month period to which he had agreed, had received copies of the signed and notarized documents containing the 12-month holdback provision, and received written confirmation that the "original, fully executed, acknowledged and notarized Agreement and Memorandum containing the twelve (12) month Holdback provision had been transmitted" to the escrow agent for the transaction and the title company for the transaction. He alleged L.A. Pacific then fraudulently manipulated the Memorandum and Agreement to provide for a 60-month holdback period and had the altered documents recorded. Attached to the complaint were copies of the executed, notarized documents with the 12-month term, and copies of the recorded documents with the 60-month term. Habash simultaneously filed a notice of lis

pendens on the property. L.A. Pacific offered to pay the \$5 million before expiration of the 12-month period in exchange for removal of the lis pendens, but Habash rejected that offer.

At the same time, litigation counsel for Habash sent a letter to Paul Hastings describing its belief that Paul Hastings either had knowledge of the alleged forgery and alteration of documents, or had participated in these acts. Kirkbride sent an internal email stating that he had met with the client, and they were in the process of accumulating information. He continued: “The allegation of fraud by the seller against our client is absurd although a paralegal did indeed send out a copy of the agreement a day after the closing with pages that were supposed to have been swapped at the closing table but were not (although all of the to be swapped pages in the other versions in our files were).” This information apparently was not communicated to L.A. Pacific. Three days later, L.A. Pacific entered into an engagement agreement and conflict waiver with Paul Hastings with respect to the Habash lawsuit.²

Meanwhile, in June 2005, L.A. Pacific entered into a letter agreement to sell the property to Molasky Pacific, LLC (Molasky). This was formalized in September, with a sales price of \$235 million. By amendment in November 2005, Molasky required L.A. Pacific to have the lis pendens removed and released. L.A. Pacific moved to expunge the lis pendens. In support of that motion, Paul Hastings attorney Katz declared that at the request of Alter, he had prepared modified documents to reflect the change from the 12-

² The conflict section included this statement: “The Firm represented Client in connection with the transaction that underlies the Litigation and in which it is alleged that, among other things, a page or pages of the documentation for the transaction were substituted post closing in an effort to defraud or otherwise injure the plaintiffs; however, Client provided the closing documents for the transaction and Client’s personnel substituted the page(s) in question pre-closing, specifically disclosing and negotiating the same with plaintiffs’ principal pre-closing. Thus, Client has determined that plaintiffs have fabricated their position in the Litigation and that the Firm is in no way responsible for any acts complained of in the Litigation.” The paragraph then noted the possibility that firm lawyers might be called upon to testify and the need for the client to consent to that.

month holdback period to the 60-month period and had emailed the modified pages to Alter for substitution into the Agreement and its Exhibit A. According to Katz, on the morning of March 24, 2004, Alter informed him that his assistant had substituted the pages and he would bring the documents, executed by L.A. Pacific, to the signing meeting with Habash. “At the commencement of the meeting, Mr. Alter placed the several execution versions of the proposed Sale Documents on the table in front of Mr. Habash, and informed him expressly” that L.A. Pacific had signed all the sale documents, that the outside date for payment of the \$5 million had been changed from 12 months to 60 months, and that L.A. Pacific would agree to acquire the property only on condition that the holdback period be set at 60 months. There was no mention of any error by Paul Hastings or its paralegal.

In January 2006, the trial court granted L.A. Pacific’s motion to expunge the lis pendens on the ground that adequate relief could be secured by posting an undertaking. Habash immediately filed a nearly identical action against L.A. Pacific in Nevada, and filed a new lis pendens against the property. The Nevada court denied L.A. Pacific’s motion to expunge this lis pendens. As a result, L.A. Pacific could not conclude its sale of the property to Molasky. The Nevada action was stayed pending resolution of the California action.

L.A. Pacific moved to compel arbitration of the Habash lawsuit under the terms of the Agreement. The trial court denied the motion. In *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, the Court of Appeal reversed and remanded for an evidentiary hearing.

In April 2006, L.A. Pacific filed a cross-complaint against Habash in his California lawsuit, alleging causes of action for abuse of process, slander of title, intentional interference with contract and indemnity. The following month, L.A. Pacific substituted Greenberg Traurig as counsel in place of Paul Hastings. Paul Hastings signed a tolling agreement with respect to a possible malpractice suit against it pending the outcome of the Habash litigation.

Following a lengthy evidentiary hearing on the motion to compel arbitration, the California action was ordered to arbitration. A 20-day arbitration was conducted in early 2009. The panel found that the testimony of Habash and his attorney was not credible, that the parties had agreed to the 60-month outside payment date, and that L.A. Pacific had made no misrepresentation about the holdback period. The panel also found that L.A. Pacific had not breached the Agreement in any respect and denied Habash's claims for rescission and damages based on fraud and breach of contract. As to L.A. Pacific's affirmative claims, the arbitrators found that Habash's conduct amounted to abuse of process, slander of title, and intentional interference with L.A. Pacific's subsequent agreement to sell the property. The panel awarded L.A. Pacific \$140,371,269 in damages, \$3 million in attorney fees, and \$759,100 in costs. Habash filed for bankruptcy a few days later. Ultimately the bankruptcy court lifted the automatic stay to permit L.A. Pacific to pursue confirmation of the award. Habash's motion to vacate the award was denied, and the petition to confirm the award was granted. Judgment was entered, and Habash appealed. In *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, Division Two of this district affirmed the judgment.

L.A. Pacific then brought this action against Paul Hastings, alleging causes of action for legal malpractice, breach of fiduciary duty, and breach of contract. The essence of the action is that after Habash agreed to change the holdback period from 12 months to 60 months, Paul Hastings committed collating errors which failed to ensure that the executed documents properly reflected the change. When it discovered that the changes were not reflected in all of the signed and notarized documents, Paul Hastings asked the escrow officer to insert the new pages into the documents, without obtaining any further signatures, initials or other written confirmation from Habash or his counsel about the change. This allowed Habash to present a colorable claim of fraud to support the rescission action, resulting in years of litigation, loss of a lucrative sale, and substantial attorney fees. Further, Paul Hastings failed to inform L.A. Pacific of the error for a lengthy period of time, and continued to represent L.A. Pacific in Habash's

rescission action without acknowledging its part in causing the harm. L.A. Pacific sought punitive damages based on breach of fiduciary duty.

Paul Hastings moved for summary judgment or summary adjudication on the theory that L.A. Pacific prevailed in all respects against Habash's claims in the underlying action, and thus Paul Hastings' alleged malpractice was not the cause of any harm to L.A. Pacific. The trial court denied the motion, and Paul Hastings seeks extraordinary relief from that order.

DISCUSSION

I

Paul Hastings asserts the court erred in denying summary judgment based on causation because the contract drafted by Paul Hastings has been litigated and upheld in its entirety. In *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244, the Supreme Court held the same causation standard must be met in a transactional malpractice action as in a litigation malpractice action: the plaintiff "must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Ibid.*) To do so, "the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only "'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.'"" (*Id.* at p. 1243.)

L.A. Pacific contends Paul Hastings' collation error and insufficient documentation of the correction of that error caused L.A. Pacific to spend money defending against Habash's action and prevented it from selling the property. Paul Hastings argues evidence of its alleged error does not establish that it caused harm to L.A. Pacific because ultimately the contract drafted by Paul Hastings was upheld in its entirety by the arbitration panel, L.A. Pacific defeated all of Habash's claims against it and succeeded in its counterclaims against Habash, winning an award of over \$140 million plus attorney fees and costs, and these outcomes were affirmed by the appellate court.

While the contract prepared by Paul Hastings eventually was upheld, L.A. Pacific presented evidence of significant damage suffered along the way as a result of alleged errors by Paul Hastings. It is important to note that L.A. Pacific claimed more than just an error in the distribution of documents that still indicated a 12-month holdback period when the final agreement was to a 60-month holdback period. That error was in fact corrected in the recorded documents before the transaction closed. L.A. Pacific alleged and presented evidence that Paul Hastings failed to document the correction with Habash or his counsel in any formal way, despite direct information from L.A. Pacific that Habash was not to be trusted. On the day before the transaction closed, Paul Hastings negotiated a side letter with Habash's counsel providing that post-closing adjustments would be offset against the amounts due in the future under the holdback provision in the Agreement—the very same provision that contained the 60-month holdback period. There was no mention or other confirmation in this side letter that the parties had agreed to change the holdback period from 12 months to 60 months. Nor were any other efforts made to memorialize that change in writing. Paul Hastings points to closing checklists provided to Habash's counsel which reference the 60-month holdback period; whether such references constituted sufficient confirmation of Habash's agreement to the change in contract terms is a factual question. And the references apparently were insufficient to convince the Nevada court to lift the *lis pendens* early enough in the Nevada litigation to save the Molasky sale.

On this record, we find a triable issue of fact that the existence of erroneous documents and the recording of corrected ones, coupled with the absence of written confirmation by Habash that he had agreed to the correction of the error, gave Habash documentation allowing—and perhaps encouraging—him to present a colorable claim for rescission based on alleged fraud while depriving L.A. Pacific of the ability to readily dispose of Habash's claim.

There was evidence this lack of documentation caused tangible injury to L.A. Pacific. The Molasky sale became contingent on L.A. Pacific having Habash's *lis pendens*, filed as part of Habash's rescission lawsuit, removed and released. The Los

Angeles Superior Court allowed L.A. Pacific to bond around the lis pendens, at a cost of \$200,000. Habash then dismissed the California action and filed a virtually identical action in Nevada; he recorded a new lis pendens giving notice of the Nevada action. L.A. Pacific was unable to convince the Nevada court to expunge the new lis pendens in time for the removal deadline in the Molasky purchase. Molasky terminated the contract, and charged L.A. Pacific \$53,500 for attorney fees and costs.

This evidence supports L.A. Pacific's theory that Paul Hastings' error in the transaction documentation, and its further error in failing to obtain written confirmation from Habash with respect to the correction of that error, gave Habash an opportunity to pursue rescission of the transaction and deprived L.A. Pacific of the means to quickly refute Habash's action. As a result, L.A. Pacific was unable to complete the profitable sale of the property to Molasky, was deprived for many years of the use of the proceeds from that sale, and incurred costs with respect to that failed sale.

The fact that the ultimate arbitration award included these sums as damages does not mean L.A. Pacific was not harmed by Paul Hastings' errors. At a minimum, it lost the opportunity to obtain and utilize the proceeds of the Molasky sale during the many years of litigation from the loss of the sale in early 2006 until the affirmance of the arbitration award on appeal in 2012.

This case bears a strong resemblance to *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457 (*Sindell*.) In that case, defendant attorneys were retained to prepare, document, and put into effect an estate plan which would transfer property to the client's children and provide for his grandchildren. The plan was properly prepared, except that defendants failed to obtain the consent of the decedent's second wife to the characterization of certain estate property as the decedent's separate property, resulting in those gifts and transfers being attacked in litigation filed by the second wife and her children. Decedent's children then brought a legal malpractice action against the attorneys. The question presented was "what event triggers the client's 'actual injury' and the accrual of a claim for malpractice." (*Id.* at p. 1464.)

Plaintiffs alleged that at the time the estate plan was prepared, decedent's wife did not contest decedent's view that the property was his sole and separate property. They alleged she was, at that time, willing to sign a consent to the various gifts and transfers needed to implement the estate plan, and expressly waive any claim of community property she might otherwise have asserted. "Thus, when defendants failed to obtain that consent, their negligence made possible litigation asserting a community property claim which could not have otherwise been raised." (*Sindell, supra*, 54 Cal.App.4th. at p. 1469.) The purpose of obtaining the waiver "would not be to make the transfer 'valid' or 'effective,' but rather to render unlikely (or at least easy-to-defeat) subsequent litigation attacking [decedent's] implicit claim to sole and separate ownership of the assets to be conveyed." (*Id.* at p. 1470.)

Defendants argued plaintiffs would only suffer actual injury if the pending litigation resulted in a judgment adverse to plaintiffs' claims. Plaintiffs argued, and the court agreed, that they suffered actual injury when the pending litigation was filed by the wife and her children. Where the purpose of a lawyer's retention is to place the client and intended beneficiaries "in a posture of quiet ownership of assets, and the lawyer negligently fails to obtain a simple written consent which would all but preclude costly litigation, the mere fact of such litigation is the unwanted consequence." (*Sindell, supra*, 54 Cal.App.4th at p. 1470, italics omitted.) Similarly, in this case the litigation itself, and particularly the inability to remove the Nevada lis pendens, were the unwanted consequences resulting from Paul Hastings' failure to obtain written confirmation that the executed documents had all been changed to provide for a 60-month holdback term.

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, the Supreme Court addressed the question of when a client suffers actual injury for purposes of the statute of limitations under Code of Civil Procedure section 340.6. The court held the client sustained actual harm when the law firm's neglect required the client to pay defense costs, lose investment opportunities for those funds, and gave insurers an objectively viable defense to coverage. (See also *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1060 [if counsel's alleged errors had

required the client to act to protect his interests by bringing or defending an action against a third person, he might have a tort cause of action against counsel; instead, no claims were made against the client, so counsel's alleged negligence did not cause the client to spend money in his futile attempt to overturn the settlement].)

Paul Hastings argues that Habash was determined to rescind the agreement, and would have done so even if the errors had not occurred. There is evidence that Habash was looking for ways to avoid the contract, but on this record, it is only speculation that he would have attempted to do so in the absence of Paul Hastings' errors, or that any other attempt he might have made would have resulted in a similar substantial and costly delay for L.A. Pacific. The fact that the 60-month term in the contract was ultimately upheld did not "unring" the actual injury allegedly caused by Paul Hastings' errors; instead it potentially reduced the amount of damage caused by Paul Hastings.

Causation is generally a question of fact, unless reasonable minds could not dispute the absence of causation. (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666.) We conclude there is a triable issue of fact as to causation, and that the denial of summary judgment on this ground was proper.

II

Paul Hastings also claims L.A. Pacific should be judicially estopped from asserting that Paul Hastings' conduct caused Habash to file his rescission action because it maintained—successfully—in the arbitration that Habash "always intended" to dishonor the parties' bargain, could have falsified the evidence in his own files to support his claim, and did so.

Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735.) It is an equitable doctrine to protect against fraud on the courts. (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 47.) "The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.]

Application of the doctrine is discretionary. [Citation.]” (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.) “The doctrine applies when ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’” (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

We do not find the doctrine applicable in this case, primarily because the position asserted by L.A. Pacific in the underlying action against Habash was not totally inconsistent with the position it asserts in this case.

Paul Hastings points to specific portions of pleadings filed by L.A. Pacific in the arbitration against Habash to demonstrate how L.A. Pacific played “fast and loose with the courts” to advance different agendas in the successive lawsuits. The first reference is to Paragraph 31 in L.A. Pacific’s statement of claims. This portion quoted by Paul Hastings follows an excerpt from Habash’s testimony in a 2007 evidentiary hearing, at which he was asked about financial difficulties he was having and their impact on future transactions. Habash acknowledged that no bank would do business with him if he had a judgment against him for embezzlement. He also agreed that, in such a case, investors would not give him money. He was asked: “Anyone you want to sell your property to is going to be extremely wary of entering into a transaction with you, correct?” He replied “Yes.” Then he was asked: “They might, for example, want to take added precautions if there is a last minute change in the deal that you agreed to to make sure that you don’t change your story after you sign and walk out, correct?” Again he answered “Yes.” Following that is the assertion by L.A. Pacific: “As we now shall explain, this last question and answer perfectly capture what happened here—namely, there was a last minute change in the deal to which Habash absolutely agreed, but, unaware of Habash’s true nature, L.A. Pacific *and its counsel* took few added precautions to protect themselves against Habash changing his story after he signed. And, based upon evidence adduced during discovery, it now is clear that Habash always intended to change his story and sue

at an opportune moment. This is fraud. And, with this background in mind, we now turn to the events surrounding the signing of the contract documents.” (Italics added.)

This argument is consistent with the position L.A. Pacific asserts in this action. It argues, and has produced evidence, that it was concerned about Habash’s lack of trustworthiness, expressed those concerns to Paul Hastings, and asked Paul Hastings to investigate whether Habash was involved in litigation. Paul Hastings conducted a litigation review but failed to discover a lawsuit pending in Los Angeles Superior Court accusing Habash of fraud based on his diversion of over \$7 million in his management of Inns Nevada. Thus, L.A. Pacific and Paul Hastings were not fully aware of Habash’s true nature and failed to take sufficient added precautions to try to prevent him from suing to avoid the contract. L.A. Pacific’s position in the arbitration is not inconsistent with this position. The distinction is that in the arbitration, L.A. Pacific was seeking relief from one wrongdoer, Habash, who fully intended to try to get out of the contract. In this action, it is seeking relief from another alleged wrongdoer, Paul Hastings, which provided Habash with a means to accomplish his plan not only by its accidental inclusion of 12-month documents, but more importantly, by its failure to adequately document Habash’s agreement to the 60-month term. This failure permitted Habash to make his colorable claim of fraud and deprived L.A. Pacific of the ability to quickly dispose of that claim. There was no purpose in the action against Habash to argue that Paul Hastings also should bear responsibility for the losses. The arbitrators were, in fact, aware of the errors attributable to Paul Hastings, mentioning them more than once in their decision. But these alleged errors did not relieve Habash of responsibility; they merely made it easier for him to succeed, at least temporarily, in his efforts to unravel the sale. Judicial estoppel would be inappropriate where the positions are not totally inconsistent, and where they are not adopted by the first tribunal.

The second item in the previous litigation upon which Paul Hastings relies is contained in L.A. Pacific’s opposition to Habash’s motion to compel production of documents from Alter’s hard drive. L.A. Pacific resisted production, claiming it was unnecessary because the documents upon which Habash relied—those containing the 12-

month holdback period—“are fabrications and nothing more.” In a footnote, L.A. Pacific stated: “At the risk of stating the obvious, all plaintiffs would have had to do is take copies of pages from the penultimate version of the sales contract and substitute them in the signed versions they received.” This statement is entirely consistent with L.A. Pacific’s position in this case that Paul Hastings should have done more than simply replacing the 12-month pages with 60-month pages, such as securing Habash’s signature or initials on the changed pages, or having him sign a separate confirmation of the change.

The same analysis applies to the statements in L.A. Pacific’s post-arbitration brief that Habash had 60-month contracts all along and someone doctored the evidence, and that Habash and his associates altered, destroyed, and planted evidence to fit their litigation theories. These assertions are not inconsistent with L.A. Pacific’s position that Paul Hastings should have taken steps to document the changed time period, which would have provided evidence to promptly disprove Habash’s claims. Since the positions are not totally inconsistent, judicial estoppel does not apply. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182 [for the doctrine to apply, the positions must be clearly inconsistent so that one necessarily excludes the other].)

Paul Hastings also claims L.A. Pacific should have been precluded from relying on documents from attorney Driggs’ files because it had successfully excluded these documents in the prior proceeding as unreliable and fabricated. Judicial estoppel only applies where the first tribunal adopts the position of the party or accepts it as true. (*Aguilar v. Lerner, supra*, 32 Cal.4th at pp. 986-987.) That is not the case here. During the hearing on the motion to compel arbitration of the underlying litigation, the trial court granted L.A. Pacific’s ex parte motion to preclude admission of the Driggs’ files because “the chain of custody is not adequately demonstrated as to the safe-keeping of the specific pages on which [Habash] rel[ies].” The ruling was expressly based on an insufficient foundational showing, not on a finding that the documents were unreliable or fabricated.

III

Finally, Paul Hastings argues that, at a minimum, summary adjudication should have been granted on the punitive damages claim because there was no evidence of oppression, fraud, or malice. Under Civil Code section 3294, punitive damages may be recovered “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice” Malice, for purposes of this statute, is “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civ. Code, § 3294, subd. (c)(1).)

“‘Despicable conduct’” has been described as conduct “‘[having] the character of outrage frequently associated with crime.’” (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.) A breach of fiduciary duty alone, without malice, fraud or oppression, does not support an award of punitive damages. (*Id.* at p. 1050.) “‘Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff’s rights, a level which decent citizens should not have to tolerate.’” (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.)

L.A. Pacific based its punitive damages claim on evidence that Paul Hastings did not inform it of the collation error at the time Habash sent his letter regarding the 12-month due date for the \$5 million payment, that it refused to provide successor counsel with metadata that had the potential to aid L.A. Pacific in its defense of the Habash action, and that it attempted to blame the errors on L.A. Pacific in draft declarations (which admittedly were never filed). While these acts might support L.A. Pacific’s claims of legal malpractice and breach of fiduciary duty, they do not rise to the level of extreme indifference to the client’s interests which would support an award of punitive damages. The trial court should have granted summary adjudication on the claim for punitive damages.

DISPOSITION

The trial court is directed to grant summary adjudication in favor of Paul Hastings on L.A. Pacific's claim for punitive damages. In all other respects the petition is denied. The alternative writ is discharged and the stay is dissolved. The parties are to bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.